MAY 26 2005

No. 04-1314

IN THE

Supreme Court of the United States

RANDOLPH A. OLSON,

Petitioner,

v.

TEAMSTERS LOCAL NO. 70, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; and UNITED PARCEL SERVICE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT UNITED PARCEL SERVICE, INC.

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QUESTION PRESENTED

Does the Ninth Circuit's unpublished Memorandum Decision in this case create a conflict among the Circuit Courts of Appeal requiring intervention by this Court, where the decision followed well settled Ninth Circuit law (consistent with virtually all of the Circuit Courts of Appeal) in requiring a plaintiff claiming discriminatory retaliation under Title VII of the Civil Rights Act of 1964 to prove by direct or circumstantial evidence that the individual who made the decision to terminate his employment had knowledge of his protected activity?

STATEMENT PURSUANT TO RULE 29.6

United Parcel Service, Inc. has issued shares to the public. It has no parent company and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioner requests that this Court issue a Writ of Certiorari to review one aspect of one jury instruction related to the proof required to establish a causal connection between an adverse employment decision and an employee's participation in activity protected by Title VII of the Civil Rights Act of 1964 ("Title VII").

Petitioner was discharged in August, 1998 under the terms of a collective bargaining agreement after he had failed to return to work from a leave of absence for almost three (3) years due to a non-work related injury. His termination was upheld by a joint labor-management panel whose decisions were final and binding under that same labor contract.

Petitioner's claims against Respondent United Parcel Service, Inc. ("UPS") were tried before a federal jury in May, 2003. Petitioner was granted wide latitude in attempting to establish through circumstantial evidence a causal connection between his protected activity and his termination which occurred several years later; nevertheless, the jury returned a unanimous verdict in favor of Respondent, rejecting Petitioner's claims of retaliatory discharge. That verdict was affirmed on appeal in an unpublished Memorandum Decision of the Ninth Circuit Court of Appeal.

REASONS FOR DENYING THE PETITION

A. The Petition Does Not Involve An Important Issue of Federal Law Nor Does It Involve A Significant Conflict Among the Circuit Courts of Appeal On An Important Issue of Federal Law That Requires Resolution by This Court.

The Ninth Circuit in this case affirmed an unanimous jury verdict and upheld the District Court's jury instruction on retaliatory discharge under Title VII. The Ninth Circuit's unpublished Memorandum Decision does not contain any novel or unprecedented interpretation of law related to the elements of a Title VII retaliation claim that must be proven at trial. Rather, the Memorandum Decision below merely reaffirmed over 20 years of precedent in the Ninth Circuit which uniformly has held that in order to establish a causal connection between the adverse employment decision and plaintiff's Title VII protected activity, the plaintiff must establish by direct or circumstantial evidence that the individuals who participated in or influenced the adverse decision were aware of the existence of plaintiff's protected activity.

This analysis is hardly remarkable, and represents the consensus of the other circuits that have considered the issue.

Petitioner claims that the Memorandum Decision below presents a significant conflict between decisions in other circuits on this same issue. This claim does not withstand scrutiny, as the decisions cited do not present the type of clear conflict that require resolution by this Court. The alleged conflict does not raise an important issue of federal law which requires the intervention of this Court.

B. The Ninth Circuit's Unpublished Memorandum Decision Does Not Create A Conflict Among the Circuit Courts of Appeal.

The Ninth Circuit, consistent with virtually all of the federal circuits, has long held that a decisionmaker's knowledge of the plaintiff's Title VII protected activity is a key element of a plaintiff's discriminatory retaliation claim. *See Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 797 (9th Cir. 1982). In fact, shortly before trial in this case, the Ninth Circuit reaffirmed the principle that, in order for a plaintiff to prove that he or she was retaliated against (e.g., fired) for engaging in Title VII protected activity, the plaintiff bears the burden of proving that the individual who made the adverse employment decision (the decisionmaker) was aware of the plaintiff's protected activity at the time the decision was made. *See Raad v. Fairbanks North Star Borough School District*, 323 F.3d 1185, 1197, *as amended* (9th Cir. 2003). In other words, the Ninth Circuit, in conformity with the majority of the federal Circuit Courts of Appeal, has declined to impute general "corporate" knowledge of a plaintiff's protected activity onto an individual decisionmaker. *Id.* The district court in this case followed this well established precedent in issuing its jury instruction on retaliation, which was affirmed on appeal.

Petitioner now claims that the unpublished Memorandum Decision creates a conflict among the Circuit Courts of Appeal. (Pet. for Writ, at 8-10) Specifically, he argues that the Second Circuit and the Eighth Circuit do not require a plaintiff to prove knowledge of the decisionmaker in a retaliation claim. In fact, Petitioner argues that imputing general corporate knowledge to a decisionmaker is what the law ought to be. (Pet. for Writ, at 10) But the two decisions upon which Petitioner relies neither stand for that proposition, nor are they inconsistent with the common-sense analysis of requiring him to establish that the

decisionmaker was aware of his protected activity, in order to prove that he was fired for engaging in such protected activity.

Petitioner cites an Eighth Circuit decision, *Broadus v. O.K. Industries, Inc.*, 238 F.3d 990 (8th Cir. 2001), suggesting that the Eighth Circuit concluded that a jury instruction requiring a plaintiff to prove the decisionmaker's knowledge of the protected activity would be improper.[1] This is not so. The Eighth Circuit in *Broadus* did not even address the issue. The Court merely found that there was no error in rejecting the employer's request for such an instruction because the employer failed to cite any case authority in support of the instruction. 238 F.3d at 990. In fact, Eighth Circuit precedent is to the contrary.

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1. Petitioner further argues that the Eighth Circuit in *Broadus* held that proof of a decisionmaker's knowledge is not part of a plaintiff's *prima facie* case. (Pet. for Writ, at 9) Petitioner's argument about his burden of proof at the *prima facie* stage of the case is puzzling, given that his claim was tried to a jury and he is challenging the jury instruction given at trial. That is, once the claim proceeds to trial on the ultimate issue of retaliation, analysis regarding the *prima facie* case "drops from the case." *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08 (1993)

> 'If the defendant carries this burden of production, the presumption [under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)] raised by the prima facie case is rebutted' and 'drops from the case.' The plaintiff then has 'the full and fair opportunity to demonstrate,' through presentation of his own case and through cross-examination of the defendant's witnesses, 'that the proffered reason was not the true reason for the employment decision,' and that race was. He retains that 'ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination.'

(quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981)) (internal citations omitted).

See Talley v. United States Postal Service, 720 F.2d 505, 508 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984) (Eighth Circuit upheld district court's dismissal of retaliatory discharge claim following bench trial, concluding that plaintiff failed to prove the requisite causal connection between her protected Title VII activities and her discharge because unrebutted trial testimony demonstrated that the decisionmaker had no knowledge of plaintiff's prior Title VII activities).

Petitioner's interpretation of the Second Circuit decision, *Gordon v. New York City Board of Education*, 232 F.3d 111 (2d Cir. 2000), also is erroneous. Petitioner cites only to a select portion of the decision — the portion discussing plaintiff's burden at the *prima facie* stage — claiming that *Gordon* supports the proposition that a plaintiff need not prove that the individual decisionmaker had knowledge of the protected activity and that general corporate knowledge can be imputed to the decisionmaker.

But a more complete reading of *Gordon* reveals that the Second Circuit did not eviscerate the decisionmaker's knowledge requirement and did not embrace plaintiff's theory of imputed knowledge, as he claims. First, as noted, Petitioner focuses upon a portion of the *Gordon* decision which discusses a plaintiff's burden at the *prima facie* stage, which is inapplicable here as Petitioner had a full and fair opportunity to try his claim before a jury and is now challenging a jury instruction.

Omitted from Petitioner's argument is the very next section of the *Gordon* decision. In that portion of its opinion, the Second Circuit found the issue of a decisionmaker's knowledge (of plaintiff's protected activity) to be subsumed

within the plaintiff's burden to prove the causal connection between the protected activity and the adverse employment action. In fact, the Court acknowledged that other Circuit Courts of Appeal have held that a plaintiff must show that the individual decisionmaker knew of the protected activity. 232 F.3d at 117.

The Second Circuit concluded that although the plaintiff need not present *direct* evidence of a decisionmaker's knowledge, the plaintiff's burden of proving causation requires a showing, through circumstantial or direct evidence, that the individual "agent" (decisionmaker) had knowledge of the protected activity or was acting upon the orders of a superior who had the requisite knowledge:

> A jury, however, can find retaliation even if the agent denies direct knowledge of a plaintiff's protected activities, for example, *so long as the jury finds that the circumstances evidence knowledge of the protected activities or the jury concludes that an agent is acting explicitly or implicit upon the orders of a superior who has the requisite knowledge.* This is so, moreover, regardless of whether the issue of causation arises in the context of plaintiff's satisfaction of her prima facie case or as part of her ultimate burden of proving that retaliation 'played a motivating role in, or contributed to, the employer's decision.'

Id. at 117 (citations omitted) (emphasis added).

Contrary to Petitioner's claims, the Second Circuit in *Gordon* recognized that the plaintiff bears the burden of proving that a manager or supervisor with the "requisite

knowledge" was involved in the adverse employment decision.[2] *Gordon* does not embrace Petitioner's "imputed corporate knowledge" theory. Indeed, if imputed knowledge based upon the mere existence of a chain of agency relationship alone was sufficient to prove causation, then there would have been no need for *Gordon* to hold that a jury could find evidence of an individual agent's knowledge of protected activity through direct or circumstantial evidence. It would be illogical to find that a plaintiff had "proven" that a manager intentionally fired him *because of* his protected activity, if the plaintiff had not presented direct or circumstantial evidence to show that the manager who made the termination decision knew about the protected activity for which the manager presumably retaliated or was influenced by a superior with the requisite knowledge.

In short, neither *Gordon* nor *Broadus* supports Petitioner's claim of a conflict among the Circuit Courts of Appeal.

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2. The *Gordon* decision at first blush may appear to represent a conflicting approach to the knowledge requirement in a retaliation claim. But this impression is a creature of the peculiar facts of that case. In *Gordon*, the employer Board of Education had *conceded* that the Board Superintendent and the Board as a legal entity had knowledge of plaintiff's prior lawsuit. 232 F.3d 111, 113 (2d Cir. 2000). Despite this concession by the Board, the jury instruction at issue in *Gordon* precluded the jury from finding that the specific individuals who took adverse action and claimed lack of knowledge of plaintiff's protected activity may have been acting at the direction of a superior with the requisite knowledge (such as the Board Superintendent). *See id.* at 114. The peculiar facts of *Gordon* are not present in our case.

C. The Ninth Circuit's Unpublished Memorandum Decision Does Not Represent Any Change In The Law And Is In Accord With The Majority Of The Federal Circuit Courts Of Appeal.

The Ninth Circuit's Memorandum Decision in this case is in accord with longstanding Ninth Circuit precedent. It does not represent an interpretive change to the law and is consistent with the decisions of the other federal Circuit Courts of Appeal.[3]

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3. *See Brungart v. Bellsouth Telecomm. Inc.*, 231 F.3d 791, 798-800 (11th Cir. 2000), *cert. denied*, 532 U.S. 1037 (2001) (Eleventh Circuit affirmed summary judgment for employer on retaliation claim where there was unrebutted evidence that decisionmaker had no knowledge of protected conduct, rejecting plaintiff's argument that knowledge should be "imputed" to the corporation where other corporate officials had knowledge of protected conduct); *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1197-98 (11th Cir. 1997) (in affirming summary judgment for employer on retaliation claim, Eleventh Circuit held that "the plaintiff must show that the corporate agent who took the adverse action was aware of the plaintiff's protected expression"); *Maarouf v. Walker Mf'g Co.*, 210 F.3d 750, 755-56 (7th Cir. 2000) (Seventh Circuit affirmed summary judgment for employer on retaliation claim because plaintiff failed to refute employer's evidence that ultimate decisionmaker was unaware of protected activity at the time of the decision – even where plaintiff submitted evidence that his protected activity was made known to the head of employer's human resources department); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998) (Fourth Circuit affirmed summary judgment for employer on retaliation claim where undisputed evidence indicated that decisionmaker was unaware of protected activity); *Williams v. Rice*, 983 F.2d 177, 181 (10th Cir. 1993) (Tenth Circuit affirmed summary judgment for employer on retaliation claim, holding that "plaintiff must show that the individual who took adverse action against him

(Cont'd)

In May 2003, just before trial began in this case, the Ninth Circuit reaffirmed the decisionmaker's knowledge requirement in *Raad v. Fairbanks North Star Borough School District*, 323 F.3d 1185, 1197-98, *as amended* (9th Cir. 2003). In *Raad*, the Court affirmed summary judgment for the employer on one of plaintiff's Title VII retaliation claims, holding that although plaintiff argued that her protected activity was known to the school's EEO officer and the personnel director, "as well as to most principals, who were typically informed when discrimination complaints were made," plaintiff's retaliation claim failed as a matter of law. The Court explained that the plaintiff failed to present evidence showing that "the particular principals who made the allegedly retaliatory hiring decisions, in fact *were* aware of her complaints." 323 F.3d at 1197 (italics in original). Without such evidence, there can be no genuine issue of material fact because "[i]mputing knowledge of [plaintiff's] protected activity to the principals in this context would be just as inappropriate as imputing knowledge of the race of an applicant in a disparate treatment case when there is no evidence that the employer knew the applicant's race." *Id.*

(Cont'd)

knew of the employee's protected activity"); *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 267-68 (5th Cir. 1994) (Fifth Circuit upheld judgment notwithstanding the verdict dismissing plaintiff's retaliation claim because plaintiff had introduced no evidence to show that plaintiff's direct supervisor had any knowledge of her protected activity when he terminated her, even though plaintiff had made complaints to other supervisors); *Talley v. United States Postal Serv.*, 720 F.2d 505, 508 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984) (Eighth Circuit upheld dismissal of retaliation claim where evidence demonstrated that decision maker had no knowledge of protected activity).

In so holding, the Ninth Circuit relied on its 1982 decision, *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). The *Cohen* Court had vacated a judgment and award for plaintiff precisely because there was no evidence that the manager who made the adverse employment decision had knowledge of the plaintiff's protected activity. The plaintiff in *Cohen* had filed a complaint with the EEOC, which came to the attention of the employer's Vice President and Director of Employee Relations. A different manager, who later implemented the policy that adversely affected the plaintiff, had no knowledge of plaintiff's EEOC complaint. 686 F.2d at 795, 797. On appeal, the Ninth Circuit concluded that there was "no evidence that any company official or employee who had knowledge of [the plaintiff's] complaint had any part in the policy decision." *Id.* at 797 n.5. The Ninth Circuit held that where the decisionmaker was unaware of the protected activity at the time of the adverse decision, the "requisite causal link" is broken, "preclud[ing] the establishment of a prima facie case of retaliation." *Id.* at 797.

The Ninth Circuit's unpublished Memorandum Decision in this case is based upon long established precedent, does not announce a change in the law, and does not create any conflict among the Circuit Courts of Appeal.

CONCLUSION

Despite Petitioner's attempt to claim conflict on the issue of whether general corporate knowledge may be imputed to an individual decisionmaker for purposes of proving a retaliation claim, the cases cited by Petitioner do not represent any such conflict among the Circuit Courts of Appeal. The Ninth Circuit's Memorandum Decision is well grounded in logic and case authority, and also is in conformity with the majority of the federal Circuit Courts of Appeal.

Wherefore, the Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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